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NO. 86-870

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

V.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

On Petition for Writ of Certiorari
to the Mississippi Supreme Court

MOTION FOR LEAVE TO FILE BRIEF
AND
BRIEF OF AMICUS CURIAE,
ROBERT E. LONGINO, JR.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Robert Longino respectfully states to the Court and moves the Court as follows:

1. Interest of Amicus Curiae. Robert Longino is the owner of tidally affected land on the Mississippi coast. His interest in the land is described in greater detail in the attached brief, particularly in the section stating the interest of the amicus, which is incorporated here for all purposes. In most respects, he is in the same position as the landowners who are parties in this case, except that his land is a much smaller, residential plot.

2. Appearance as Amicus in Both the Trial Court and the State Supreme Court. Robert Longino learned of the trial of this case from newspaper reports. Recognizing the significance of the issues for his own residential land, he appeared in the trial court as amicus curiae. He also appeared in the Mississippi Supreme Court as amicus curiae.

3. Desirability of an Amicus Curiae Brief; Reasons for Believing that Existing Parties May Not Address All Issues. The

decision below would create chaos for coastal land titles. Robert Longino provides the perspective of a small landowner similar to people throughout the coastal area who will need to defend their homes. This perspective is not provided by the parties. For example, on information and belief, the parties in this case spent many hundreds of thousands of dollars merely surveying a short section of coastline, but Robert Longino simply could not afford such a survey.

4. *Avoidance of Unnecessary Duplication.* This brief has been written with an awareness of the content of the Petition for Certiorari, in an effort to avoid unnecessary duplication.

5. *Requests for Consent; Failure to Obtain Consent of All Parties; Filing of Motion.* Movant has sought, but has been unable to obtain, the consent of all parties, and hence the filing of this Motion.

For these reasons, Robert Longino prays that the Court grant him leave to appear as amicus curiae.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, ROBERT E. LONGINO, JR.

INTEREST OF AMICUS CURIAE ROBERT E. LONGINO, OWNER OF A SMALL PLOT OF RESIDENTIAL LAND ON THE MISSISSIPPI COAST

Robert E. Longino, Jr. is the owner of a small tract of property in Harrison County, Mississippi, located upon a branch of the Tchoutacabouffa River, a waterway subject to the influence of the tide. Robert Longino learned of this case through newspaper coverage, attended portions of the trial, recognized the implications for his property, and decided to present his views as an amicus curiae to the Mississippi trial court in order to protect his interests. He also appeared in the Mississippi Supreme Court. Having attempted to protect his land in each of the lower courts, he now appears as amicus curiae to present his views to this Court.

Robert Longino is a lifelong citizen of Mississippi, residing at Biloxi. He inherited the land here described from his father, through other relatives. Through the years, he has faithfully paid taxes on the property and saved the tax receipts. He has conveyed a portion of the acreage inherited by him to his two sons. It is a place of great natural beauty, containing a residence with large picture windows facing the water.

The interface of Robert Longino's property with the river includes meanders, inlets, and accretions typical of the area geography. A fill has been made across an inlet to allow access to a boat landing. None of these meanders, inlets, or artificial structures are shown on published maps. Yet Robert Longino could not easily afford a sophisticated survey of this property, particularly if a survey of every tidally influenced inlet is required. He believes his interests in this regard are typical of those of landowners of similar size. Thus, although situated at the opposite end of the state from the land in question in the case at bar, and although his small parcel is dwarfed by the land claimed by petitioners and respondents, he fears his interest may be harmed by the state's position here.

Robert Longino learned of this case through newspaper reports. He arranged to attend the trial of the case. This experience left him more convinced of the importance of the case to him and others similarly situated, and he therefore decided he should get his views before the trial court. This amicus curiae brief is the ultimate result.

SUMMARY OF ARGUMENT

This brief does not attempt to duplicate the detailed case law arguments expected to be made by the parties. Instead, it attempts to explain practical and legal difficulties created by the State's position for the party landowners and others, including small landowners such as Robert Longino.

The public trust doctrine is not susceptible of being understood from dictum taken out of context. For example, it is not confined only to very large bodies that are "great arms of the

sea," despite literal dicta to that effect, nor is it so unreasonably broad as to extend literally into every nook and cranny into which "the tide ebbs and flows." Adoption of the unreasonably broad, "toothpick boat" approach of the Mississippi court would plunge land titles into chaos, frustrate landowners' settled and legitimate expectations, and prevent reasonable management, maintenance or development of coastal property. The energies of virtually every coastal landowner would be channeled into resistance against the overreaching of the state, all at enormous, crushing cost. The federal questions presented here are substantial.

REASONS FOR GRANTING THE WRIT

IF INTERPRETED IN ACCORDANCE WITH THE MISSISSIPPI SUPREME COURT'S "TOOTHPICK BOAT" APPROACH, SO AS TO REACH MINISCULE NON-NAVIGABLE INLETS, THE PUBLIC TRUST DOCTRINE WOULD HAVE SERIOUS ADVERSE EFFECTS FOR SMALL COASTAL LANDOWNERS.

A. As this Case Shows, Dicta in the Prior Decisions, if Read out of Context, Would Support Either an Unreasonably Broad, or an Unreasonably Narrow, Public Trust Doctrine, and this Court Should Clarify Those Dicta.

The public trust doctrine is not the subject of clear statement in any one narrow phrase. It is, instead, an idea that must be understood from its historical purposes. If one were to select dicta out of context, one could support a wide variety of different approaches to the public trust doctrine, ranging from the extremely broad to the extremely narrow.

If dicta from the cases were followed literally, for example, one could reach all of the following inconsistent interpretations of the public trust doctrine:*

1. That it extends only to the "great arms of the sea." *E.g., Steamboat Magnolia v. Marshall*, 39 Miss. 109, 119 (1860). If this approach were taken, only such large bodies as the Bay of St. Louis would be included, but not such important waterways as the Jourdan River. Although supportable by dicta from the cases, this view of the public trust doctrine is probably unreasonably narrow.

2. That it extends to the great arms of the sea, plus "navigable" waters. *E.g., The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557 (1870). Navigability may be measured by various factors, such as the ability to accommodate a vessel of a certain draw, or length of the waterway, or commercial navigability in practice. Case law to support these views is available.

3. That it extends wherever "the tide ebbs and flows." *E.g., Martin v. The Lessee of Waddell*, 41 U.S. 367 (1842). A slavishly literal view of this dictum, such as the Mississippi court's "toothpick" approach, would extend the public trust doctrine even to the most microscopic and temporary inlet.

Each of these interpretations, in addition to others, can be supported by selected dicta. The point, however, is that selec-

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* Amici have not repeated the briefing undertaken by Appellants. A full statement of the basis for these interpretations is to be found in their brief.

tion of dictum while ignoring the historical nature of the public trust doctrine would be erroneous. The Mississippi court heavily stressed the "wherever the tide ebbs and flows" dictum; it ignored case law expressly excluding "little rivers and streams," *see The Daniel Ball v. United States, supra,* and it ignored the fact that no case, either Mississippi or federal, has ever applied the doctrine to a case in which minor inlets, as opposed to great commercial waterways, were in issue.

B. Unreasonably Broad Interpretation of the Public Trust Doctrine Would Throw Coastal Land Titles into Chaos.

It is with good reason that case law excludes small streams from public trust. This case has demonstrated the collossal expense necessary to establish the boundaries of coastal land. The proof has been technical and scientific. It has required teams of specially trained personnel, and it has required lengthy expert testimony in court. This proof does not include the complexities that would be created by tracing the course of every bayou, inlet, drainage canal, pond, or other watercourse that may cross the boundary line.

A rule of law that costs more to apply than the value of the rights it controls is unlikely to be a good rule of law. This is particularly true in the area of land titles. Clear legal rules, providing for unambiguous determination of title without undue expense, are desirable. Particularly for the small landowner, the survey evidence necessary to make the required determination for every small inlet would be impracticably expensive. The result would be that the small landowner would not know what he owned and what he did not, and title to land all along the Mississippi Gulf Coast would be thrown into chaos.

Furthermore, it is desirable in the land title area to have rules establishing boundaries that are relatively permanent. A landowner might be faced with a lengthy survey and court battle to determine the boundaries of every small inlet, lasting a decade or longer, and once he had finished, there would be substantial likelihood that the course of one or more of the inlets would have shifted, necessitating the performance of the process all

over again. A rule of law requiring repeated expensive determinations, rather than settling the issue once and for all, would not be a good rule of law.

In fact, when one attempts to chart the course of the most miniscule inlets, one is faced with the problem that their exact complexion may change almost daily. A high rain might change the course of a channel. Even acquatic plants or animals might change the shape of the boundary. These examples are not farfetched at all, when one considers that the surveyor must make judgments as to the shape of the mean high-tide line. If he is determined to chart the course of every small rivulet, as distinguished from obtaining an accurate measure of major waterways, his judgment may differ from day to day according to minor changes in natural phenomena, which thus may result in major changes in land titles. This result would be undesirable.

Furthermore, in many places along the coast, landowners have erected bulkheads obliterating evidence of small inlets, leaving land titles virtually undeterminable if they depend on every small course into which the tide may "ebb and flow." Much property along the Mississippi Gulf Coast is covered by residential landowners in subdivisions, who are particularly likely to establish bulkheads. In such a case, it is probably easy to determine the course of the major waterway upon which the property sits, but if the landowner were required to prove that there was never a filling of the smallest kind of inlet back through recorded history, the right of most coastal residential landowners to occupy the property they reasonably believe is privately their own would be in serious jeopardy.

C. *Unreasonably Broad Interpretation of the Public Trust Doctrine Would Deny Effect to the Settled, Legitimate Expectations of Small Private Landowners Concerning Their Property Boundaries.*

As a consequence of the chaos into which it would throw coastal land titles, unreasonably broad interpretation of the public trust doctrine would mean that land which small private landowners believed, even quite reasonably, that they owned,

would not in fact be owned by them. Portions of land bought and paid for would not have belonged to the seller, and hence would not belong to the buyer. Citizens would be faced with loss of title to land as to which they had paid full value and could trace title back to a patent from the state. In fact, the present case is just such a case.

D. Unreasonably Broad Interpretation of the Public Trust Doctrine Would Prevent Rational Management of Land Near the Coastline.

Unreasonably broad interpretation of the public trust doctrine would mean that the landowner had no right even to enter strips of property that may traverse his land. Although a narrow inlet might run the entire length of his property, dividing it into two parcels, he would have no right to create a pathway or bridge across it, could not cut weeds or undergrowth in it, and could not perform most of the tasks that a responsible coastal landowner would perform. If structures on the land (such as the landowner's own home) were undermined by the shifting of an inlet the landowner would have no right to shore up his property. He would have no legal means of eradicating pests that might breed in the narrow strip of land that he did not own. And, of course, the filling of even the most miniscule rivulet, the alteration of its course, or its modification in any way would be illegal, and the State would presumably be under a disability even to permit it.

Additionally, applying a rule by which small inlets traversing a landowner's property were not owned by him would impede reasonably and necessary development, including that of mineral resources. Amicus curiae Robert Longino, for example, has been approached by potential oil and gas lessees interested in his property. If it were necessary to exclude small strips of land traversing his property or that of a landowner similarly situated, the result would be to fragment the land, require considerably greater expenses for lease acquisition, require more complicated operating agreements, and, in general, impose additional costs upon mineral development. The same result

would occur from either large or small surface development of the property.

E. The Problem is National in Scope.

The following excerpt from Porro and Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 Seton Hall L. Rev. 323, 331 (1972), describes the situation in another state using the "toothpick" approach and shows that the problem is national in scope:

> Presently, a backlog of cases which relate to the tidelands problem is still awaiting a trial date, and even though recent legislation has authorized the addition of six judges to handle these matters, this is not an effective solution. A case-by-case judicial determination regarding the title to approximately 244,000 acres of tideland is an overwhelming task. Extensive proofs will be required in each instance, including comprehsnsive map displays, extensive soil analyses, vegetation and pollen analyses, topographical data, historical and tidal data, scientific and expert testimony regarding the natural characteristics of the marsh, artificial changes, salt water intrusion—in short, a pattern of expensive and extensive litigation.

Petitioners' marine surveyor, Paul O'Hargan, testified on the basis of comparative experience in Florida and New Jersey that a lawsuit was needed in New Jersey anytime an individual was interested in defining his title in the coastal zone, resulting in a "chaotic" situation. (Miss. Appendix 135-36).

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted,

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